4-23-2012

Maschek v. State Respondent's Brief Dckt. 38517

IN THE SUPREME COURT OF THE STATE OF IDAHO

SPENCER JAY MASCHEK	)	
	)	
Petitioner-Appellant,	)	NO. 38517
	)	
vs.	)	
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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STATEMENT OF THE CASE

Nature of the Case

Spencer Jay Maschek appeals from the judgment entered upon the district court's order summarily dismissing his petition for post-conviction relief.

Statement of Facts and Course of the Underlying Criminal Proceedings

In February 2008, a vehicle belonging to Maschek "was found burned in Devil's Corral in Jerome County." (R., p.103.[1]) When contacted by the police, Maschek initially reported that the vehicle had been stolen. (Id.) In a subsequent police interview, Maschek admitted that he had "made arrangements with Patrick Morrisey to take the vehicle and burn it." (R., p.104.)

The state charged Maschek with conspiracy to commit arson. (R., p.104; Exhibits:[2] Criminal Complaint, filed 3/6/08, and Information for a Felony, filed 5/20/08.) Pursuant to a plea agreement, Maschek entered an Alford[3] plea to the conspiracy charge and the state agreed to recommend a unified sentence of eight years, with four years fixed. (R., p.105; Exhibit: Offer-Plea Agreement, filed 8/7/08.) The state also agreed to recommend that the sentence be suspended

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[1] The facts of the underlying criminal case are derived, in part, from the factual statement set forth by the state below in its "Statement Of Claimed Undisputed Material Facts" (see R., pp.103-07), which Maschek has also adopted, in part, as his statement of facts on appeal (see Appellant's brief, pp.3-4).

[2] At the state's request, the district court took judicial notice of 32 documents from the underlying criminal case. (R., pp.110-12; Tr., p.12, L.6 – p.14, L.4.) Those documents have been included as exhibits to the record on appeal. (See R., pp.136-37 (Certificate Of Exhibits).)

[3] North Carolina v. Alford, 400 U.S. 25 (1970).

and that Maschek be placed on supervised probation for four years, with the condition that he "meaningfully participate in and comply with the requirements of Mental Health Court." (Id.) In the event Maschek was not accepted into Mental Health Court, the state agreed "to limit itself to a period of retained jurisdiction, not actual penitentiary time to be served." (Id.)

Maschek was ultimately denied admission into Mental Health Court. (R., p.105.) Consistent with the state's agreed-upon recommendation, the district court imposed a unified sentence of eight years, with four years fixed, and retained jurisdiction. (R., p.106; see also State v. Maschek, Docket No.36580, 2010 Unpublished Opinion No. 370 (Idaho App., March 3, 2010).) At the conclusion of the retained jurisdiction period, the district court relinquished jurisdiction and ordered Maschek's sentence executed. (Id.) The court's order relinquishing jurisdiction was affirmed on appeal. (Id.)

Statement of Facts and Course of the Post-Conviction Proceedings

Maschek filed a timely *pro se* petition for post-conviction relief and supporting affidavit, alleging numerous claims of ineffective assistance of counsel. (R., pp.4-32.) At Maschek's request, the court appointed counsel to represent Maschek in the post-conviction proceedings. (R., pp.33-46.) Appointed counsel thereafter filed an amended petition, restating the claims in the original petition but presenting no new factual allegations or supporting evidence. (R., pp.77-79.) As "concisely [re]stated," the amended petition alleged that trial counsel was ineffective for, *inter alia:*

(iii) Failure to move to withdraw petitioner's guilty plea, pursuant to I.C.R. 11, after petitioner was denied admittance into Mental Health Court[;]

(iv) Failure to adequately explain the entirety of the plea agreement and what would happen if petitioner was denied entrance into Mental Health Court[; and]

(v) Failure to move to withdraw petitioner's guilty plea, pursuant to I.C.R. 11, after the court relinquished jurisdiction at the rider review hearing.

(R., pgp.77-78.)

The state answered the amended petition and moved to summarily dismiss it, arguing that the claims therein were conclusory, disproven by the record and failed to raise a genuine issue of material fact. (R., pp.80-109.) After a hearing, the district court granted the state's motion and dismissed the amended petition in its entirety. (R., pp.116-18.) The court entered its final judgment of dismissal on December 14, 2010. (R., pp.119-20.) Maschek timely appealed. (R., pp.121-24.)

ISSUE

Maschek states the issue on appeal as:

> Whether the district court erred when it summarily denied post conviction relief without considering the record which established Petitioner's claims of ineffective assistance of counsel, or, in the alternative, Petitioner is entitled to post conviction relief since his attorney failed to move to withdraw his guilty plea when he did not receive probation despite the court's express advice that he could.

(Appellant's brief, p.5.)

The state rephrases the issues on appeal as:

Has Maschek failed to show error in the summary dismissal of his ineffective assistance of counsel claims?

ARGUMENT

Maschek Has Failed To Show Error In The Summary Dismissal Of His Ineffective Assistance Of Counsel Claims

A. Introduction

The district court dismissed Maschek's amended post-conviction in its entirety, ruling that the claims in the petition were either conclusory or disproved by the record, or both. (R., pp.116-18; Tr., p.17, L.18 – p.23, L.1.) On appeal, Maschek challenges the dismissal of only the three ineffective assistance of counsel claims "concerning the plea agreement" and/or his guilty plea. (Appellant's brief, p.9.) With respect to those three claims, Maschek argues that he is entitled to an evidentiary hearing or, alternatively, post-conviction relief because, he contends: (1) the district court relied solely on misrepresentations of the prosecutor and did not consider evidence that he contends supports his ineffective assistance of counsel claims, and (2) the underlying criminal record establishes his ineffective assistance of counsel claims as a matter of law or, at the very least, raises a genuine issue of material fact entitling him to an evidentiary hearing on each of his claims. (Appellant's brief, pp.15-26.)

Maschek's arguments fail. He has failed to show error in either the scope of the district court's review of the relevant evidence or its application of the law to the facts in concluding that Maschek failed to carry his burden of presenting a genuine issue of material fact to overcome the summary dismissal of his ineffective assistance of counsel claims.

B. Standard Of Review

In reviewing the summary dismissal of a post-conviction application, the appellate court reviews the record to determine if a genuine issue of material fact exists which, if resolved in petitioner's favor, would require relief to be granted. Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007); Nellsch v. State, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992).

C. Maschek Has Failed To Show Any Basis For Reversal Based On His Claims That The Prosecutor Misrepresented The Record And That The District Court, Relying On The Alleged Misrepresentations, Failed To Consider Evidence Relevant To His Ineffective Assistance Of Counsel Claims

Maschek argues that the prosecutor in the post-conviction case misrepresented the record by citing only to portions of the change of plea hearing that were favorable to the state's position, and that the district court, "believing that the state was accurately portraying the record, simply relied on it" in dismissing Maschek's ineffective assistance of counsel claims. (Appellant's brief, pp.22-25; see also p.15 ("Presumably, the post conviction court did not read the entire transcript of the change of plea hearing, but just relied on the state's misleading version of it appearing in its brief.").) Maschek's arguments are without merit. While the state below did cite to only a portion of the change of plea hearing in its brief in support of its motion for summary dismissal (R., pp.94-96), the state also specifically requested that the district court take judicial notice of the *entire* transcript of the change of plea hearing on which the state's arguments were based (R., pp.110-12). The district court did so (Tr., p.12, L.6 – p.14, L.4) and quoted directly from that transcript, not from the state's brief, in

dismissing Maschek's petition (Tr., p.18, L.12 – p.19, L.15). Maschek's claims on appeal that the district court "simply relied on" the state's representations of the record and "did not read the entire transcript of the change of plea hearing" are wholly unfounded.

Even if the district court had relied solely on the state's representations of the record in dismissing Maschek's ineffective assistance of counsel claims, Maschek has failed to show that such reliance would, by itself, constitute any basis for reversal. "On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of material fact exists based on the pleadings, depositions and admissions together with any affidavits on file." Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007) (citing Gilpin-Grubb v. State, 138 Idaho 76, 80, 57 P.3d 787, 791 (2002)). Because this Court conducts an independent review of the record to determine whether summary dismissal is appropriate, Maschek's attacks on the integrity of both the prosecutor and the district court are not only factually unsupported, they are also legally irrelevant.

D. Maschek Has Failed To Show Error In The District Court's Determination That Maschek Failed To Present A Genuine Issue Of Material Fact Entitling Him To An Evidentiary Hearing On Any Of His Ineffective Assistance Of Counsel Claims

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief in response to a party's motion or on the court's own initiative. "To withstand summary dismissal, a post-conviction applicant must present evidence establishing a prima facie case as to each element of the

claims upon which the applicant bears the burden of proof." State v. Lovelace, 140 Idaho 53, 72, 90 P.3d 278, 297 (2003) (citing Pratt v. State, 134 Idaho 581, 583, 6 P.3d 831, 833 (2000)). Thus, a claim for post-conviction relief is subject to summary dismissal pursuant to I.C. § 19-4906 "if the applicant's evidence raises no genuine issue of material fact" as to each element of petitioner's claims. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007) (citing I.C. § 19-4906(b), (c)); Lovelace, 140 Idaho at 72, 90 P.3d at 297. While a court must accept a petitioner's unrebutted allegations as true, the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001)). If the alleged facts, even if true, would not entitle the petitioner to relief, the trial court is not required to conduct an evidentiary hearing prior to dismissing the petition. Id. (citing Stuart v. State, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990)). "Allegations contained in the application are insufficient for the granting of relief when (1) they are clearly disproved by the record of the original proceedings, or (2) do not justify relief as a matter of law." Id.

As relevant to this appeal, Maschek's amended petition alleged that trial counsel was ineffective for not adequately explaining the plea agreement to him and for not filing a motion to withdraw Maschek's plea, either after he was denied admission to Mental Health Court or after the district court relinquished jurisdiction and ordered his sentence executed. (R., p.78; see also pp.11-12, 20-23 (statements in Maschek's affidavit pertaining to ineffective assistance of

counsel claims at issue).) To overcome summary dismissal of these claims, Maschek was required to demonstrate that "(1) a material issue of fact exist[ed] as to whether counsel's performance was deficient, and (2) a material issue of fact exist[ed] as to whether the deficiency prejudiced [Maschek's] case." Baldwin v. State, 145 Idaho 148, 153-54, 177 P.3d 362, 367-68 (2008) (internal citations omitted); see also Strickland v. Washington, 466 U.S. 668, 687-88 (1984) (a petitioner alleging ineffective assistance of counsel must show both deficient performance and resulting prejudice). To establish deficient performance, the burden was on Maschek "to show that his attorney's conduct fell below an objective standard of reasonableness. This objective standard embraces a strong presumption that trial counsel was competent and diligent." Id. "[S]trategic or tactical decisions will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation." Id. To establish prejudice, Maschek was required to show "a reasonable probability that but for his attorney's deficient performance the outcome of the proceeding would have been different." Id.

Application of the foregoing legal standards to the facts of this case supports the district court's order of summary dismissal; Maschek failed to demonstrate from his pleadings and evidence that a genuine issue of material fact existed as to either the deficient performance or prejudice prongs of his ineffective assistance of counsel claims.

1. Maschek Failed To Present An Issue Of Material Fact Entitling Him To An Evidentiary Hearing On His Claim That Counsel Was Ineffective For Failing To Adequately Explain The Plea Agreement

Maschek entered his guilty plea pursuant to a plea agreement. (Exhibit: Offer-Plea Agreement, filed 8/7/08.) The written agreement, signed by Maschek on August 7, 2008, required Maschek to plead guilty to conspiracy to commit first degree arson. (Id.) In exchange, the state agreed to recommend a prison term of "4 years determinate plus 4 years indeterminate, for a total of 8 years." (Id.) The state also agreed to recommend that the sentence be suspended and that Maschek be placed on supervised probation for four years, with the condition that he "meaningfully participate in and comply with the requirements of Mental Health Court (MHC)." (Id.) Finally, as is relevant to this appeal, the state agreed that if Maschek was "not accepted into MHC, the state [would] limit itself to a period of retained jurisdiction, not actual penitentiary time to be served." (Id.)

Ultimately, Maschek was denied admission to Mental Health Court. (R., p.105.) Consistent with the terms of the state's agreed-upon recommendation, the district court imposed a unified sentence of eight years, with four years fixed, and retained jurisdiction. (R., p.106.) At the conclusion of the retained jurisdiction period, the district court relinquished jurisdiction and ordered Maschek's sentence executed. (Id.)

In his amended post-conviction petition, Maschek alleged that trial counsel was ineffective for failing to "adequately explain the entirety of the plea agreement and what would happen if petitioner was denied entrance into Mental Health Court." (R., p.78.) The district court summarily dismissed this allegation,

ruling that it was both without factual support and disproved by the record. (Tr., p.19, L.16 – p.20, L.12.) The court explained:

> The offer/plea agreement sets forth that Mascheck [sic] had read the offer, that he understood it, and that he accepted the offer on its stated terms.
>
> As I've already noted, a term of the plea offer was that if Mascheck [sic] was not accepted into Mental Health Court, the state would limit itself to a period of retained jurisdiction.
>
> Also, the change of plea advisory form sets forth that Maschek had discussed all the ramifications of his case with his lawyer and had discussed fully with his lawyer the nature of the charge and Maschek's constitutional rights and defenses to the charge, including the possible consequences. As such, this allegation is disproved by the record and is dismissed.

(Tr., p.19, L.22 – p.20, L.12.) Contrary to Maschek's assertions on appeal, a review of the record supports the district court's determination that Maschek failed to demonstrate a genuine issue material fact entitling him to an evidentiary hearing on this claim.

The only "evidence" Maschek offered to support his claim that counsel failed to adequately explain the plea agreement consisted of his own self-serving statements that defense counsel promised him that "he would be placed in the 'Mental Health Court' program or be placed on probation, with a condition of continuing counseling" (R., p.19, ¶ 40); "[w]hile discussing the plea agreement and the entry of an "Alford Plea" with Defense Counsel prior to the entry of the plea, [he] was instructed to answer the Judge's question as 'just a formality'" and "to give answers as though [he] was entering a willing guilty plea" (R., p.21, ¶¶ 47 and 48); and defense counsel promised him that he "would be receiving probation so long as [he] did as instructed" (R., p.21, ¶ 49). As found by the

district court, however, the record of the underlying criminal proceedings clearly disproves Maschek's claims. The plea agreement itself very clearly set forth the state's obligations with respect to its sentencing recommendation and specifically provided that, if Maschek was "not accepted into MHC, the state will limit itself to a period of retained jurisdiction, not actual penitentiary time to be served." (Exhibit: Offer-Plea Agreement, filed 8/7/08.) Maschek signed the agreement and, in so doing, attested: "***I have read the offer, I understand it, and I accept the offer on the above-stated terms***." (Id. (bold and italics original, underline added).) He also filled out and signed a guilty plea advisory form in which he affirmatively indicated that he was satisfied with his attorney's services and that his attorney had fully discussed with him the possible consequences of his guilty plea. (Exhibit: Change Of Plea Form – *Alford* Plea, filed 8/7/08, p.2.) Significantly, Maschek also acknowledged understanding that, as a result of pleading guilty, he could be "imprisoned in the State Penitentiary" and his "sentence may be imposed **with no right to probation**." (Id., p.3 (emphasis added).)

In addition to being contrary to his own statements in the plea advisory form that he was satisfied with counsel's performance, had fully discussed with counsel the possible consequences of his guilty plea and understood that a prison sentence could be imposed with no right to probation, Maschek's claim that counsel failed "to adequately explain the entirety of the plea agreement and what would happen if [he] was denied entrance into Mental Heath Court" also

stands in contrast with the statements he made at the change of plea hearing.

At the hearing, the district court conducted the following colloquy:

> [THE COURT:] Mr. Maschek, I want to first talk to you about this plea agreement. I know you have read it. I know you have signed it, but it's important that I make sure that you understand what you're committing to, or that you understand what the state's commitment is, I should say.
>
> That commitment is this: That if you plead guilty to this charge this morning, the state will be recommending to the court a unified sentence of eight years, consisting of four years fixed, four years indeterminate. What that means is that should that sentence ever be imposed, you would have to serve a minimum of four years in the Idaho State Penitentiary before your would be eligible for parole. After that, during the second four year portion, parole would be up to the parole board.
>
> Do you understand that that's the consequence or the meaning of that sentence?
>
> [Maschek]: Yes, sir.
>
> THE COURT: The state is going to recommend that that sentence be suspended and that you will, as a condition of probation, participate in the mental health court program here in Twin Falls. I'm assuming that Mr. Williams [defense counsel] has explained in some detail what that means?
>
> [Maschek]: Yes, sir.
>
> THE COURT: That program is an intensive program. It is probably at least a one year program. It may be longer. It requires a great commitment on your part for weekly meetings and numerous other things. Is that kind of generally your understanding of that program?
>
> [Maschek]: Yes, sir, it is my understanding is it's kind of like very intense probation.
>
> THE COURT: That's probably a good explanation of that.
>
> Do you understand that there are some hoops that you have to go through before you can be considered for mental health

court? In other words, you have to be evaluated by the mental health court staff, you have to meet the diagnosis qualifications, that I don't have anything to do with that. In other words, I certainly will follow these – **I've told your counsel I will follow these recommendations and ask that you be put in mental health court, but I cannot control that. If for some reason you don't qualify, then what happens is you come back before me for sentencing and we look at some alternatives. Do you understand that?**

[Maschek]: **Yes, sir.**

THE COURT: **So there is a little bit of a gamble if you will, to you. Do you understand that?**

[Maschek]: **Yes.**

THE COURT: **And if you're not allowed to get into mental health court, your plea in this case will still stand; in other words, you can't withdraw it. Do you understand that?**

[Maschek]: **Yes, sir.**

(Exhibit: 8/7/08 Tr., p.3, L.13 – p.5, L.18 (emphasis added).) Later in the plea colloquy the following exchange took place:

THE COURT: ...[I]f it became necessary to actually sentence you in this case because you were not accepted into mental health court – well, let me rephrase it this way. Do you understand that's the maximum penalty that could be imposed in this case [a 25-year prison sentence and a $100,000 fine]?

[Maschek]: Yes, sir.

THE COURT: Again, I have told your attorneys, pursuant to a chambers conference that we had yesterday, that since this matter is presented to me as a Rule 11 plea agreement that I will honor the recommendations of the state to place you on probation. Do you understand that if for some reason something would come up and I would change my mind about that, that I would allow you to withdraw your plea of guilty? Do you understand that?

[Maschek]: Yes, sir.

THE COURT: Are you satisfied with the representation of Mr. Williams?

[Maschek]: Yes, sir.

THE COURT: Is there anything that he has not done that you believe that he should do?

[Maschek]: No, sir.

(Exhibit: 8/7/08 Tr., p.8, L..20 – p.9, L.16.)

The record of the change of plea hearing, in conjunction with the plea agreement itself and Maschek's statements on the plea advisory form, demonstrate that Maschek understood the terms of the plea agreement, including the "what would happen if [he] was denied entrance into Mental Health Court." (R., p.78.) The district court went over the terms of the agreement and confirmed that Maschek understood that the state would be recommending probation and Mental Health Court but, if Maschek did not qualify for Mental Health Court, the court would "look at some alternatives." (Exhibit: 7/8/08 Tr., p.3, L.19 – p.5, L.13.) The court advised Maschek that, under the terms of the plea agreement, he could face up to eight years in prison, a fact which Maschek said he understood. (Id., p.3, L.19 – p.4, L.6.) Maschek also acknowledged understanding that he would not be permitted to withdraw his plea if he was not accepted into Mental Health Court. (Id., p.5, Ls.14-18.) Toward the end of the plea colloquy the court told Maschek that it "would **honor the recommendations of the state** to place [him] on probation" but, if the court changed its mind about that, it would allow Maschek to withdraw his plea. (Id., p.9, Ls.1-9 (emphasis added).) As dictated by the clear terms of the plea agreement, previously

explained by the court and acknowledged by Maschek earlier in the change of plea hearing, however, the state's obligation to recommend probation was contingent upon Maschek's acceptance into Mental Health Court. (Id., p.4, L.7 – p.5, L.18.) Otherwise, the record demonstrates, Maschek understood that he could face imposition of a prison sentence, "**with no right to probation.**" (Id., p.3, L.19 – p.5, L.18; Exhibit: Change of Plea Form – *Alford* Plea, filed 8/7/08, p.3.)

The allegations in Maschek's amended petition and affidavit relating to his understanding of the plea agreement, particularly the allegation that he was promised probation, were clearly contradicted by his own signed statements in both the written plea agreement and the plea advisory form and were also contrary to his statements at the change of plea hearing. Because the allegations were disproved by the record, they did not create a genuine issue of material fact entitling him to an evidentiary hearing. Workman, 144 Idaho at 522, 164 P.3d at 802 (post-conviction allegations insufficient for granting of relief when they are clearly disproved by the record); Cootz v. State, 129 Idaho 360, 368, 924 P.2d 622, 630 (Ct. App. 1996) (same). Maschek has failed to show error in the summary dismissal of this claim.

2. Maschek Failed To Present An Issue Of Material Fact Entitling Him To An Evidentiary Hearing On Either Of His Claims That Counsel Was Ineffective For Failing To Move To Withdraw His Plea

Maschek alleged that counsel was ineffective for failing to move to withdraw his guilty plea at two separate stages of the proceedings – "after [Maschek] was denied admittance into Mental Health Court," and "after the court

relinquished jurisdiction at the rider review hearing." (R., p.78.) The district court dismissed both of these claims, ruling that Maschek failed to make even a *prima facie* showing that such motions, if made, would have been granted. (Tr., p.18, L.12 – p.19, L.15, p.20, L.13 – p.21, L.7.) Maschek has failed to show error in the district court's rulings.

When a defendant claims his counsel was ineffective for failing to file a motion, "the district court may consider the probability of success of the motion in question in determining whether the attorney's inactivity constituted incompetent performance." Wolf v. State, 152 Idaho 64, ___, 266 P.3d 1169, 1172 (Ct. App. 2011) (citing Boman v. State, 129 Idaho 520, 526, 927 P.2d 910, 916 (Ct. App.1996)). "Where the alleged deficiency is counsel's failure to file a motion, a conclusion that the motion, if pursued, would not have been granted by the trial court, is generally determinative of both prongs of the *Strickland* test." Id. at ___, 266 P.3d at 1172-73.

Motions to withdraw a guilty plea are governed by I.C.R. 33(c), which provides:

> (c) Withdrawal of plea of guilty. A motion to withdraw a plea of guilty may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw defendant's plea.

Pursuant to this rule, a motion to withdraw made before sentencing may be liberally granted, but must be granted only if the defendant proves either that the plea was not knowingly, intelligently and voluntarily made or that there is another just reason for withdrawal of the guilty plea. State v. Hanslovan, 147 Idaho 530,

535-36, 211 P.3d 775, 780-81 (Ct. App. 2008) (citing State v. Rodriguez, 118 Idaho 957, 959, 801 P.2d 1308, 1310 (Ct. App. 1990)). A motion to withdraw a guilty plea after sentencing should be granted only to "correct manifest injustice." I.C.R. 33(c). Application of these standards to Maschek's claims that counsel was ineffective for failing to move to withdraw his plea both pre- and post-sentencing supports the district court's determination, based upon evidence before it, that such motions would have been denied.

Maschek alleged that counsel was ineffective for failing to move to withdraw his plea after he was denied admission to Mental Health Court, but he did not allege any facts that, if true, would have entitled him to withdraw his plea at that state of the proceedings. He did not allege that his plea was involuntary in the sense that he did not understand he could be denied admission to Mental Health Court and, in fact, the record of the underlying criminal proceedings shows the opposite. When asked by the district court whether he understood that there was no guarantee he would qualify for Mental Health Court, Maschek replied, "Yes, sir." (Exhibit: 7/8/08 Tr., p.4, L.23 – p.5, L.13) He was also explicitly advised, and affirmatively acknowledged understanding, that being rejected for admission to Mental Health Court would not afford him any basis to withdraw his plea. (Id., p.5, Ls.14-18.) Having failed to allege any facts to demonstrate that his plea was involuntary or that there existed any other just reason to withdraw his plea after he was denied admission to Mental Health Court, Maschek failed to make even a *prima facie* showing that counsel was ineffective for failing to file a pre-sentencing motion to withdraw Maschek's plea.

On appeal, Maschek argues that he "is entitled to relief as a matter of law" on his claim that counsel was ineffective for not filing a motion to withdraw his guilty plea after he was denied admission to Mental Health Court "because the criminal court told him he could withdraw his guilty plea if he was not placed on probation." (Appellant's brief, pp.16-17.) Maschek's argument is nonsensical and misconstrues the pleadings. The amended petition alleged only that counsel was ineffective for failing to move to withdraw Maschek's plea "after [he] was denied admittance into Mental Health Court" (R., p.78, ¶ (iii)), not for failing to move to withdraw the plea when the court sentenced Maschek to a period of retained jurisdiction. Because the claim in the petition was limited to an allegation that the denial of admission to Mental Health Court was itself a basis for withdrawal of the plea, whatever promises the court may have made about the ultimate sentence to be imposed are irrelevant and do not entitle Maschek to relief.[4]

Alternatively, Maschek argues that he was entitled to an evidentiary hearing on the claim because the criminal court, by failing to advise Maschek that he could be sent on a rider but not be placed on probation afterward, failed to adequately explain the consequences of his guilty plea in violation of I.C.R. 11. (Appellant's brief, pp.19-22.) Again, this argument is irrelevant to the claim actually made in the petition -- that the failure to be admitted into Mental Health Court was itself a basis for withdrawal of the plea. Moreover, a review of

[4] As set forth in more detail below, the state does not concede that the court promised to place Maschek on probation regardless of whether he was admitted to Mental Health Court.

Maschek's pleadings shows that Maschek never alleged a failure of the district court to comply with I.C.R. 11 as a basis for withdrawal of his plea. (See generally R., pp.4-32, 77-79.) It is well settled that "'[t]he trial court is not required to search the record looking for evidence that may create a genuine issue of material fact; the party opposing the summary judgment is required to bring that evidence to the court's attention.'" Barcella v. State, 148 Idaho 469, 224 P.3d 536 (Ct. App. 2009) (quoting Esser Electric v. Lost River Ballistics Technologies, Inc., 145 Idaho 912, 919, 188 P.3d 854, 861 (2008)). Because Maschek never alleged a violation of I.C.R. 11 as a basis for withdrawing his plea, and because such an allegation is ultimately irrelevant to Maschek's claim that counsel should have moved to withdraw his plea based solely on the fact that he was denied admission to Mental Health Court, Maschek has failed to show any basis for reversal.

Maschek has also failed to show any basis for reversal of the district court's order summarily dismissing his claim that counsel was ineffective for not moving to withdraw his plea "after the court relinquished jurisdiction at the rider review hearing." (R., p.78, ¶(v).) Maschek would only have been entitled to withdraw his plea after sentencing upon a showing that the withdrawal was necessary "to correct manifest injustice." I.C.R. 33(c). As found by the district court, however, "[t]he record is absolutely devoid of any fact establishing any manifest injustice in this case which would have been sufficient to support Maschek's withdrawal of a guilty plea well after judgment was pronounced and

sentence imposed." (Tr., p.21, Ls.3-7.) Contrary to Maschek's assertions on appeal, a review of the record supports the district court's determination.

The only evidence Maschek presented to support his claim that counsel was ineffective for failing to move to withdraw his guilty plea after the court relinquished jurisdiction was the following statement made by the court at the change of plea hearing:

> Again, I have told your attorneys, pursuant to a chambers conference that we had yesterday, that since this matter is presented to me as a Rule 11 plea agreement that I will honor the recommendations of the state to place you on probation. Do you understand that if for some reason something would come up and I would change my mind about that, that I would allow you to withdraw your plea of guilty?

(Exhibit: 7/8/08 Tr., p.9, Ls.1-8; see also R., p.22, ¶¶ 51 and 53 (quoting court's statement at change of plea hearing).) Maschek acknowledges on appeal that the district court also advised Maschek that he could **not** withdraw his plea if he was denied admission to Mental Health Court. (Appellant's brief, p.21.) He argues, however, that "the two apparently contrary statements of the criminal court can actually be reconciled" in his favor. (Id.) Specifically, he contends:

> While the first statement of the criminal court advised that if he was not admitted into Mental Health Court he could not withdraw his guilty plea, the second statement advised that if the court was not going to place him on probation, it would allow him to withdraw his guilty plea. Thus, Mr. Maschek could withdraw his plea after his rider when jurisdiction was relinquished, because it was at that point that something had come up which made the court change its mind about placing him on probation.

(Id., pp.21-22.) Maschek's interpretation of the court's statements, while creative, is belied by a plain reading of the record.

Contrary to Maschek's claim on appeal, the district court did not advise him that "if the court was not going to place him on probation, it would allow him to withdraw his guilty plea." (Appellant's brief, p.22.) Rather, the court stated that it would "**honor the recommendations of the state to place [him] on probation**" but, if the court changed its mind about that, it would allow Maschek to withdraw his plea. (Exhibit: 7/8/08 Tr., p.9, Ls.1-9 (emphasis added).) When the court made this statement, it had already explained to Maschek that the state's obligation to recommend probation was specifically contingent upon Maschek being accepted into Mental Health Court. (Id., p.4, L.7 – p.5, L.6.) It had also explained to Maschek that, if he was not accepted into Mental Health Court, the court would look at other sentencing alternatives, and Maschek would not be permitted to withdraw his plea. (Id., p.5, Ls.6-18.) Thus, while the state agrees with Maschek that the court's statements did not conflict, the state disagrees that there is any logical way in which the statements can be reconciled in Maschek's favor. Viewed in context, the court's statement to Maschek that it would permit him to withdraw his plea if it did not honor the state's recommendation for probation was merely a promise to place Maschek on probation if he was accepted into Mental Health Court; it did not confer upon Maschek a right, or even a reasonable expectation, that he would be permitted to withdraw his plea if, upon being denied admission to Mental Health Court, he was not placed on probation.

Maschek failed to allege any facts or present any evidence to demonstrate entitlement to either the pre-sentencing or post-sentencing

withdrawal of his plea. Having failed to do so, he has failed to show any error in the summary dismissal of his claims that counsel was ineffective for not moving to withdraw his plea.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order summarily dismissing Maschek's petition for post-conviction relief.

DATED this 23rd day of April 2012.

LORI A. FLEMING
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 23rd day of April 2012, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

GREG S. SILVEY
ATTORNEY AT LAW
P.O. BOX 565
STAR, ID 83669

LORI A. FLEMING
Deputy Attorney General

LAF/pm